



**The Comptroller General  
of the United States**

Washington, D.C. 20548

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## Decision

**Matter of:** Daniel L. Hubbel, et al. - Claim for Overtime -  
Travel During Nonduty Hours

**File:** B-229363

**Date:** October 17, 1988

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### DIGEST

1. National Labor Relations Board (NLRB) employees are not entitled to overtime or compensatory time for time spent in travel outside normal work hours to or from union representation elections since the NLRB is given broad discretionary authority to hold and schedule such elections. It cannot be said that such events are unscheduled and administratively uncontrollable so as to permit overtime under the provisions of 5 U.S.C. § 5542(b)(2)(B)(iv) (Supp. IV 1986).

2. The National Labor Relations Board (NLRB) could make a determination as to immediate official necessity and compensate employees for travel during nonduty hours when they must investigate certain unfair labor practice cases. Where an NLRB employee performs return travel from an event which could not be scheduled or controlled administratively, the employee would be entitled to overtime compensation or compensatory time under 5 U.S.C. § 5542(b)(2)(B)(iv) (Supp. IV 1986) for travel during nonduty hours.

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### DECISION

This case comes to us as a joint request for a decision under 4 C.F.R. Part 22 (1987) from the National Labor Relations Board (NLRB) Union and the NLRB General Counsel. The issue we are presented is whether certain NLRB employees are entitled to overtime compensation or compensatory time for time spent in travel outside normal work hours in order to conduct union representation elections or statutory priority case investigations.

### BACKGROUND

The NLRB is charged with the statutory authority to administer secret ballot elections whereby employees can choose whether or not they wish to be represented for

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collective bargaining purposes. 29 U.S.C. § 159 (1982). In addition, the NLRB is charged with investigating certain unfair labor practices and such investigations are to be given priority over all other types of cases in the Regional Offices where they are filed. 29 U.S.C. § 160(1) (1982). Thus, the NLRB states that the Region's investigation should be completed within 72 hours absent unusual circumstances.

In some instances, the NLRB staff who must administer the elections or investigate these unfair labor practice charges must travel away from their official duty stations. The statute governing overtime compensation or compensatory time for such General Schedule employees is contained in subsection 5542(b)(2)(B)(iv) of title 5, United States Code (Supp. IV 1986), which provides:

"(b) For the purpose of this subchapter--

. . . . .

"(2) time spent in travel status away from the official-duty station of an employee is not hours of employment unless--

. . . . .

"(B) the travel . . . (iv) results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of such employee from such event to his or her official-duty station."

We have interpreted subsection 5542(b)(2)(B)(iv) to require that in order to be compensated for overtime (1) the travel must result from an event which could not be scheduled or controlled administratively and (2) there must exist an immediate official necessity in connection with the event requiring the travel to be performed outside the employee's regular duty hours. John B. Schepman, et al., 60 Comp. Gen. 681, 684 (1981).

The NLRB has presented numerous actual case situations involving employees who have requested compensatory time for either return travel or in some cases travel to the temporary duty station. The cases arose due to the need to supervise employee elections or to investigate statutory priority cases. Since the circumstances are similar in each of the cases presented in the request, we need only deal with two of them as a representative sample of each type of case.

## OPINION

### A. Travel to and from representation elections

In the case of NLRB employee Kathleen Crapse, an election was held on Friday, December 5, 1986, at a site approximately 60 miles from the Regional Office. The parties agreed to hold the election from 7 a.m. to 8:30 a.m. and 3 p.m. to 5:30 p.m. to allow the employees to vote before or after shift changes so as to minimize disruption of the employees' work schedule and to maximize voter turnout. Ms. Crapse requested compensatory time of 1-1/4 hours for her return travel after the conclusion of the election.

The NLRB and its union state that the scheduling of elections is an administratively uncontrollable event for the purposes of 5 U.S.C. § 5542(b)(2)(B)(iv) (Supp. IV 1986), and therefore NLRB employees should be entitled to overtime or compensatory time for travel outside working hours when they administer such elections. The NLRB cites to Raymond Ratajczak, B-172671, Nov. 19, 1974, in support of its contention that compensation should be allowed. In the Ratajczak case, we held that an NLRB Field Examiner could be compensated for his travel time on Saturday, a nonworkday, where the representation election was an uncontrollable event since it could only be held on that day. The parties were all truck drivers who were away from their headquarters Monday through Friday and were thus not available during the week.

The NLRB states that factors beyond the agency's control limit the available times when an election can be scheduled. The agency says it is obligated to balance the employer's production schedules, the employees' work schedules, the union's availability, and the statutory requirements for prompt, yet fair elections before a time and date can be determined. Thus, it is the NLRB's view that the scheduling of elections must be deemed administratively uncontrollable for the purposes of subsection 5542(b)(2)(B)(iv).

We do not find that the travel pursuant to an election meets the statutory requirement for the payment of overtime compensation that it result from an event which could not be scheduled or controlled administratively. The Ratajczak case cited by the NLRB is distinguishable since the only time an election could be held was on Saturday. Further, there must be both an uncontrollable event and an immediate necessity for the employee's travel which precludes proper scheduling. Mark Burstein, B-172671, Mar. 8, 1977.

The NLRB is given broad discretionary authority to schedule elections in advance. Since the participating employees must be given sufficient advance notice of an election, the element of immediate official necessity is also missing. Thus, it cannot be said that such events are unscheduled and administratively uncontrollable so as to permit overtime compensation for after-hours travel time. See 29 C.F.R. § 101.19 (1986), which states that the board will arrange all details incident to the mechanics and conduct of elections concerning representational issues.

In the example of Ms. Crapse, the record is silent as to when she traveled to the Friday election, but, in our opinion, her travel was not to an event which could not be scheduled or controlled administratively. The election could have been held on another day of the week and Ms. Crapse could have returned home during her normal duty hours. Further, since Ms. Crapse's return travel on Friday was for the purpose of returning home and was not to or from an event which could not be scheduled or controlled administratively, she is not entitled to compensatory time or overtime under 5 U.S.C. § 5542(b)(2)(B)(iv) for her return travel.

#### B. Travel to and from unfair labor practice investigations

With regard to statutory priority cases, the NLRB states that whenever an unfair labor practice charge is filed alleging a violation of certain sections of the National Labor Relations Act relating to boycotts, picketing, and work stoppages, the primary investigation of the charge must be given priority over all other types of cases in the Regional Office where it is filed. 29 U.S.C. § 160(1) (1982). The NLRB says that it has no control over when a charge will be filed. Thus, at least during the initial investigation, the charge should be considered as an emergency and the investigation should be considered an administratively uncontrollable event.

For example, on Friday, February 14, 1986, an unfair labor practice was filed in the NLRB Kansas City Regional Office and assigned to Field Examiner Daniel L. Hubbel to handle. Since witnesses were available that day and would not be available for another 5 days, Mr. Hubbel traveled to Springfield, Missouri, by air that same day during his regular duty hours. Mr. Hubbel secured affidavits from the witnesses between 4:15 p.m. and 7:15 p.m., and he was paid overtime compensation for those hours beyond his normal work hours. Mr. Hubbel returned home on Saturday, February 15, between 8 a.m. and 10:30 a.m., and he submitted a claim for 2-1/2 hours of compensatory time for his Saturday travel,

claiming that it was return travel from an administratively uncontrollable event.

The NLRB cites to our decision Charles S. Price, et al., B-222163, Aug. 22, 1986, in support of its contention that overtime should be allowed in these statutory priority cases. In the Price case, we held that certain Food and Drug Administration (FDA) investigators could be compensated for travel outside regular duty hours where the employees were ordered to travel at once due to an outbreak of food poisoning. The employees in that case left the same day they were notified, and we held in Price that there was an immediate official necessity occasioned by the unscheduled event which required the travel to be performed outside the employee's regular duty hours. The NLRB contends that a priority labor practice investigation is of the same urgent nature as the FDA investigation in Price inasmuch as Congress has mandated that these cases be given priority by the agency.

We do not believe that travel to perform investigations on unfair labor practices would, in all cases, entitle the employee to overtime compensation and compensatory time off. However, employees could become eligible on a case-by-case basis.

The NLRB is charged with a statutory responsibility to give priority handling to certain unfair labor practice cases. Thus, the NLRB may in its discretion make a determination in an individual case that there was an immediate necessity for the employee's travel which precluded any planning and scheduling control. Gerald C. Holst, B-222700, Oct. 17, 1986, and cases cited.

From the example cited above, we note that Mr. Hubbel was ordered to travel on the same day that a charge was filed, and that the charging party's witnesses would be available on that day and then would not be available until 5 days later, which would cause a delay in the investigation. Such circumstances could lead the NLRB to make a determination as to immediate necessity, but not if the NLRB could have scheduled travel the next day or at a later date.

With regard to Mr. Hubbel's return travel on Saturday, we note that, under the statute as amended in 1984, he would be entitled to overtime compensation or compensatory time for his return travel time if the agency determined that this investigation was an event which could not be scheduled or controlled administratively. Unlike the case of Ms. Crapse's travel, Mr. Hubbel's travel on Saturday would then be considered to be travel from an event which could

not be scheduled or controlled administratively and thus would be considered hours of employment under subsection 5542(b)(2)(B)(iv).

A handwritten signature in black ink, reading "Milton J. Forster". The signature is written in a cursive style with a large initial "M".

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of the United States